

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permit)
14110 (Application 12092B))
UNITED WATER CONSERVATION)
DISTRICT)
Permittee.)

ORDER: WR 82-5
Source: Sespe Creek
County: Ventura

ORDER DENYING PETITION FOR EXTENSION OF TIME
AND REVOKING PERMIT 14110

BY BOARD VICE CHAIRMAN MITCHELL AND
BOARD MEMBER DUNLAP:

The time to complete construction and application of water to the proposed use under Permit 14110 (Application 12092B) having expired; a hearing having been held by the State Water Resources Control Board on July 15, 1981 and September 21, 1981; Permittee and other interested parties having appeared and presented evidence; the evidence received at the hearing having been duly considered; the Board finds as follows:

Substance of Permitted Application 12092B

1. Permitted Application 12092B, in the name of United Water Conservation District (United), allows storage of 60,000 acre-feet per annum (afa) in Oat Mountain Reservoir, 160,000 afa in Topatopa Reservoir and 105,000 afa in Cold Spring Reservoir. The proposed season is year-round and the water is to be used for irrigation, domestic, municipal, industrial and salinity control. All three reservoirs are to be on Sespe Creek. The water is for use, generally, within the boundaries of United.

Background

2. Application 12092 was filed nearly 35 years ago on September 18, 1947. As subsequently amended the application sought to appropriate water from the Santa Clara River and Piru and Sespe Creeks, major tributaries to the river. On October 25, 1949 Applications 13417, et al., were filed by the Ventura County Flood Control District. The applications were later assigned to Calleguas Municipal Water District (Calleguas). These applications also proposed to develop water on Sespe Creek for use in Ventura County adjacent to United.

3. Decision 884 was adopted by the Board on January 15, 1958. Among other approvals, United was given approval to develop water on Piru Creek at the Santa Felicia Reservoir and at Saticoy near the present location of the Vern Freeman Diversion Dam. The portion of United's application calling for surface storage at Cold Spring Reservoir and underground storage on Sespe Creek, with exceptions, was "...denied without prejudice to the filing of new applications...at such time as the applicant is...able to proceed with diligence to construct the works." Calleguas was given approval to develop water on Sespe Creek, including the Topatopa Reservoir. Permit 11181 (Application 12092) was issued to United on February 13, 1958. Litigation followed, resulting in a judgment on March 14, 1961, remanding for reconsideration of new evidence those portions of Decision 884 which gave priority to develop water on Sespe Creek to Calleguas over United (Superior Court of California, County of Ventura, Action No. 46406).

4. Following the court's action, the Board reconsidered Decision 884 and Decision 1129 was adopted on April 29, 1963. Calleguas' right to develop water on Sespe Creek was revoked and United received approval to develop water on Sespe Creek which included the Topatopa, Cold Spring and Oat Mountain Reservoirs. Permit 14110 (Application 12092) was issued to

United on August 2, 1963. At this time the file for Application 12092 was split. File 12092A was used to house documents pertaining to Permit 11181 and File 12092B was used to house documents for Permit 14110.

5. Adopted 19 years ago, Decision 1129 required United to commence construction of development on Sespe Creek by December 1, 1967. Extensions of time were granted by the Board in 1967 and again in 1970. The last extension required the following schedule: (1) construction was to commence, ten years ago, by December 1, 1972, (2) construction was to be completed, six years ago, by December 1, 1976, and (3) water was to be fully developed, two years ago, by December 1, 1980.

6. United's current petition filed on December 4, 1973 requests the following schedule: (1) commence construction, six years ago, by December 1, 1976, (2) complete construction, three years ago, by December 1, 1979, and (3) full development of water by December 1, 1982. Action on the petition was deferred due to negotiations between the applicant and protestants. Neither design nor construction of the project have commenced and the first two requested deadlines have expired. Because the Board was unaware of any progress toward construction, this permit was noticed for revocation (Water Code Section 1410).

The Hearing Record

7. In 1966, United attempted to gain voter approval for the Sespe Project, but the proposal was defeated. No major effort has been made in the intervening years to construct the Sespe Creek reservoirs. United admits the Sespe Project as proposed in the permit is not the appropriate project for current conditions and needs (RT 23, 31, 33, 37, 50 and 109). The quantities of water authorized for diversion in Permitted Application 12092B may be too

large or may be too small. In 1966, the cost of the project was estimated to be about \$90,000,000. The current estimate of the original Sespe Project is \$165,000,000 (RT 23, 36, 50 and 88). United has budgeted no money for engineering studies on Sespe, and no engineering or economic analysis of the project is underway. Furthermore, United has no plans for financing the project (RT 47).

8. The proposed reservoirs would be located on Federal lands managed by the Forest Service. The Forest Service testified that a "RARE II" study is underway in the area; the watershed is being considered for inclusion in the Federal Wild and Scenic River System; and development near the Sespe Condor Sanctuary has been restricted. The Forest Service stated it would be in no position to consider the use of National Forest land for the Sespe Project until the "RARE II" study is complete, the Wild and Scenic River status of the watershed is determined, and any potential impacts to the condors ascertained and eliminated (Staff 1).

9. The California Condor is a rare and endangered species. Robert D. Mallette and W. Dean Carrier testified on behalf of the Department of Fish and Game (Department) concerning the condor, including its history, life-style, and habitat. Mr. Mallette is a wildlife manager supervisor for the Department and Mr. Carrier is an endangered species coordinator for the United States Forest Service. They also expressed concern over the condor's diminishing population. Ninety percent of the major nesting sites are believed to be located within the Sespe Condor Sanctuary situated within federal land. Condors do not nest within a mile and a half of any human activity. For that reason, the sanctuary has been closed to public access since 1953. Mr. Carrier testified that if the Sespe Project were built as set forth in the permit, the condor would suffer adverse effects (RT 128-153). Mr. Eisenberg,

counsel for the Department, offered uncontradicted evidence concerning the value of the aquatic habitat in Sespe Creek for wild trout and steelhead. Mr. Drescher, counsel for United, accepted the offer.

Discussion

10. United requests three additional years to study the project and report to the Board on definite plans for a Sespe development (RT 23, 31, 34, 50, (2)50 and (2)52). In support of the requested extension, United claims the Sespe Project is part of an overall development that includes Santa Felicia, Piru, the Vern Freeman Diversion and the Pumping Trough Pipeline. United claims it has been diligent on the other features of the development and that such diligence should be viewed as diligence on the Sespe Permit. Further, United claims it has been preoccupied with efforts to develop the Vern Freeman Diversion and Pumping Trough Pipeline for the past several years. As soon as these efforts are completed, United plans to devote its full effort to the Sespe Project (RT 32, 33, 51, 79-83 and (2)48). United contends it took 16 years of hearings and litigation and the expenditure of considerable money to obtain the permit for Sespe. United believes if the permit is revoked and a new application filed later, the whole process, including the cost of the litigation, could be repeated. United also expressed concern other agencies may file for the water for export out of the watershed (RT 13, 14, 35, 36, 90, and (2)51).

11. Water Code Section 1475 gives the Board discretion to determine whether progress toward the development of water under one project that may be viewed as a part of a single enterprise, shall preserve the right to develop water for all applications being a part of the enterprise. However, Section 1475 gives the Board discretion only where diligence has been exercised

from one project to another. The Board cannot exercise this discretion when there is a long period of inaction and where no engineering, design and financial program is in place to provide a continuous construction program. Since Decision 1129 in 1961 and the unsuccessful effort to provide funding through a bond election, United has made no effort to proceed to construction on the Sespe Creek Reservoirs. Where the facts, as in this case, show United has made little or no progress in the intervening years, where no engineering or design work has been prepared, and where no financial program has been promulgated, the Board is unable to make a favorable finding under Section 1475. In regard to the Freeman Diversion, United to date has provided only a temporary makeshift dam. No firm project for the pumping trough pipeline was developed until the Board threatened legal action and committed 8 million dollars to assist in funding this project. Even though progress is now being made, no actual construction has been started. Further, even at this date, it is unclear how United will finance improvements to the Vern Freeman Diversion Dam. Accordingly, the Board concludes United has not demonstrated diligence under Section 1475.

12. Water Code Section 1410 provides that, "[i]f work is not commenced...as contemplated in the permit...the Board shall...revoke the permit....". Throughout the years since Permit 14110 was issued, due diligence has been imperative. On November 19, 1981, the Board adopted Resolution No. 81-100. In this resolution the Board found the rights to the use of groundwater in the Oxnard Plain Basin must be adjudicated to preserve the basin from destruction due to groundwater overdraft resulting in seawater intrusion. The Santa Clara River and Sespe Creek supply the Oxnard Plain and vicinity in a state of nature. The Board's record leading to the adoption of the resolution indicates the groundwater basin is overdrafted, in part, because the quantity of water used

in the Santa Clara River basin exceeds the amount of surface water that has been developed for off-stream beneficial uses. Sespe Creek represents the largest undeveloped source of surface water in the basin that is available to augment surface supplies or groundwater recharge.

13. Both Decisions 884 and 1129 put United on notice of the importance of due diligence. Twenty-six years ago in Decision 884, the Board stated: "Diligence is the essence of a right to appropriate water. Accordingly, applicants must be prepared to commence construction of their projects promptly after issuance of permits.". Nineteen years ago in Decision 1129, the Board stated: "...it is necessary that United either proceed with the development or allow someone else to proceed...the Board intends to assure that actual construction work...will begin and be completed within the time allowed. Additional time will be granted for only the most extraordinary reasons....".

14. The Department of Fish and Game referred to prior Board decisions (D-893 and D-1083) which denied applications based on circumstances which they believed were similar to those in the Sespe case. In Decision 893 the Board denied several applications because the applicants has no immediate plan to proceed promptly with construction of the projects. The Board stated: "In such cases the Board has little choice in the action to be taken since it is a settled principle that an application to appropriate is not a proper instrument to make a reservation of water for a development at an indefinite and uncertain time in the future.". Similarly, a water right permit is not a proper instrument to reserve water for development at some future time.

15. In Decision 1083 the Board stated: "The applicant is not prepared to undertake construction of the works proposed by these applications,

nor does it plan to initiate action leading toward construction for an indefinite time in the future. Instead, it plans to devote all of its efforts and resources toward development of other projects."

16. The Board's regulations continue to give force to the statutory requirement of "diligence" and these decisions:

"An application will be denied when it appears after hearing that (a) the applicant does not intend to initiate construction of the works required for the contemplated use of water within a reasonable time and thereafter diligently prosecute the construction and use of water to completion, or (b) the applicant will not be able to proceed within a reasonable time, either because of absence of a feasible plan, lack of the required financial resources, or other cause." (23 California Administrative Code 776).

Although United is beyond the application stage, this language is equally applicable to a petition for an extension of time. United's testimony indicates that it had no definite project plans, no resources for undertaking planning or construction and no definite time schedule for initiating construction. The Board would not notice a new application where the applicant could not identify proposed points of diversion or locations of reservoirs.

17. Diligence is not the only issue in this case. In addition to diligence, the following matters of public interest must be considered. Conditions in the watershed and the adoption of the California Environmental Quality Act have changed project feasibility since the permit was issued. Protection of the environment and concern for endangered species are now important issues in deciding water right matters. The hearing record indicates that the development of Sespe Creek could have an adverse effect on the condor and on the aquatic habitat that supports wild trout and may support steelhead. Before any project is approved for Sespe Creek there must be a

full environmental analysis. A "RARE II" study is underway. An environmental analysis must give due consideration to the results of the "RARE II" study.

18. United has expressed concern that revocation of its permit would be followed by new applications for Sespe Creek water by entities outside the watershed. As a policy, the Board should not favor applications to export water from a water deficient area. There is no procedure whereby the Board can reserve Sespe Creek for United. The State Department of Water Resources (Department) has authority under the "State filing" statutes (Water Code Section 10500, et seq.). The Department may file an application for water which, in its judgment, may be required in the development and completion of a general plan looking toward the development of water resources. Due diligence does not apply to unassigned State filings and preference is given to use within the county of origin. United may wish to contact the Department and request that steps leading to a State filing be initiated.

Conclusions

19. It is concluded there has been a lack of diligence in proceeding with the project proposed under Permit 14110, Application 12092B; that the project as authorized by the permit is not the project that would actually be built; that United currently has no plans for a definite project nor plans for financing such project; and that there are issues of public interest that weigh against approval of the requested extension of time.

IT IS HEREBY ORDERED that the petition for extension of time is denied and Permit 14110 is revoked without prejudice to the filing of a new application at such time as a definite project is proposed and can be pursued with due diligence.

Dated: June 17, 1982

L. L. Mitchell

L. L. Mitchell, Vice-Chairman

Voted No

Carla M. Bard, Chairwoman

Jill B. Dunlap

Jill B. Dunlap, Member

F. K. Aljibury

F. K. Aljibury, Member